



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 225

RIN 0750-AI59

**Defense Federal Acquisition Regulation Supplement: Offset Costs
(DFARS Case 2015-D028)**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify requirements related to costs associated with indirect offsets under Foreign Military Sales agreements.

DATES: Effective **[Insert date of publication in the FEDERAL REGISTER]**.

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015-D028, using any of the following methods:

o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2015-D028" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2015-D028." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2015-D028" on your attached document.

o E-mail: osd.dfars@mail.mil. Include DFARS Case 2015-D028 in the subject line of the message.

o Fax: 571-372-6094.

o Mail: Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, telephone 571-372-6099.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule revises DFARS 225.7303-2, "Cost of doing business with a foreign government or an international organization," by adding paragraph (a)(3)(iii) to provide guidelines to contracting officers when an indirect offset is a condition of a Foreign Military Sales (FMS) acquisition. A reference to the Defense Security Cooperation Agency manual is also updated at DFARS 225.7301.

This interim rule specifically addresses indirect offsets as they are applied to the Defense Security Cooperation Agency's FMS cases.

II. Discussion and Analysis

DoD administers FMS programs to maintain and strengthen relationships with partner nations. Failure to nurture these relationships may create a threat to national security. DoD's FMS program allows foreign customers to request, and pay for, through inclusion of the cost in the FMS Letter of Offer and Acceptance (LOA) and DoD contract, offsets that are directly related to the FMS end items (i.e., "direct offsets"), as well as offsets that are not directly related to the end item (i.e., "indirect offsets").

DoD recognizes the need to have offsets embedded in DoD FMS contracts. However, the decision whether to engage in indirect offsets and the responsibility for negotiating and implementing these offset arrangements ultimately reside with the FMS

customer and contractor(s) involved. Thus, the DoD contracting officer is not provided the information necessary to negotiate cost or price of the indirect offsets, particularly with respect to price reasonableness determinations pursuant to FAR part 15. This interim rule provides that under these circumstances, when the provision of an indirect offset is a condition of the FMS acquisition, and provided that the U.S. defense contractor submits to the contracting officer an offset agreement or other substantiating documentation, the indirect offset costs are deemed reasonable for the purposes of FAR part 31.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis has been performed, and is summarized as follows:

The objective of this rule is to provide clarification to contracting officers when indirect offsets are a condition of an FMS acquisition. This rule revises DFARS 225.7303-2, "Cost of doing business with a foreign government or an international organization," by adding paragraph (a)(3)(iii) to provide guidelines to contracting officers when an indirect offset is a condition of a Foreign Military Sales (FMS) acquisition. This interim rule specifically addresses indirect offsets as they are applied to the Defense Security Cooperation Agency's FMS cases.

This rule does not add any reporting or recordkeeping requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. This rule does not impose any significant economic burden on small firms because the DFARS amendments merely clarify that contracting officers are not responsible for making a determination of price reasonableness for indirect offset agreements, which are not within their purview.

DoD did not identify any alternatives that could reduce the burden and still meet the objectives of the rule.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2015-D028), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

VI. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. DoD administers FMS programs to maintain and strengthen relationships with partner nations. Failure to nurture these relationships may create a threat to national security. This action is necessary because of the recent and foreseeable trend of increasing numbers and complexity of

indirect offsets desired by DoD's Foreign Military Sales (FMS) customers.

Currently, Defense Federal Acquisition Regulation Supplement (DFARS) 225.7303-2(a)(3)(ii) provides that the U.S. Government assumes no obligation to satisfy or administer the offset requirement or to bear any of the associated costs. However, DFARS 225.7301(b) provides that the U.S. Government conduct FMS acquisitions under the same acquisition and contract management procedures used for other defense acquisitions. This requires the contracting officer to adhere to FAR provisions concerning the negotiation of contracts and subcontracts (FAR part 15) and contract cost principles (FAR part 31), and thus be capable of attesting to the price reasonableness of FMS contracts, including indirect offset costs that are not tied directly to the end item. Contracting officers must follow these regulations even though no DoD appropriated funds are being used to pay for the effort, and DoD contracting officers have no insight to pricing of the indirect offset. In the past several years, compliance with regulations has resulted in an inability of contracting officers to finalize FMS contract negotiations.

The interim rule affirms that all offset costs that involve benefits provided by a U.S. defense contractor to an FMS customer that are unrelated to the item being purchased under a Letter of Offer and Acceptance (LOA), i.e., indirect offset

costs, are deemed reasonable for purposes of FAR part 31. The rule provides that no additional analysis is necessary on the part of the contracting officer, provided that the U.S. defense contractor submits to the contracting officer a signed offset agreement or other documentation showing that the FMS customer has made the provision of an indirect offset of a certain dollar value a condition of the FMS acquisition. Finally, the rule provides that the FMS customer shall be notified through the LOA that indirect offset costs are deemed reasonable without any further analysis by the contracting officer.

It is essential that DoD implement this interim rule immediately to clarify that contracting officers are not required to make price reasonableness determinations on costs associated with indirect offsets under FMS agreements, which, while included in the FMS contract, fall outside of the DoD contracting officer's purview. Immediate implementation will allow DoD contracting officers to finalize pending negotiations for FMS contracts to support U.S. allies and partners, and maintain bilateral relationships. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Part 225

Government procurement.

Amy G. Williams,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 225 is amended as follows:

PART 225—FOREIGN ACQUISITION

1. The authority citation for 48 CFR part 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Amend section 225.7301 by revising paragraph (a) to read as follows:

225.7301 General.

(a) The U.S. Government sells defense articles and services to foreign governments or international organizations through FMS agreements. The agreement is documented in a Letter of Offer and Acceptance (LOA) (see the Defense Security Cooperation Agency (DSCA) Security Assistance Management Manual (DSCA 5105.38-M)).

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3. Amend section 225.7303-2 by—

- a. Adding a heading to paragraph (a)(3), and revising the introductory text of paragraph (a)(3); and
- b. Adding a new paragraph (a)(3)(iii).

The revision and additions read as follows:

225.7303-2 Cost of doing business with a foreign government or an international organization.

(a) * * *

(3) Offsets. For additional information see PGI 225.7303-2(a)(3)), and also see 225.7306.

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(iii) All offset costs that involve benefits provided by the U.S. defense contractor to the FMS customer that are unrelated to the item being purchased under the LOA (indirect offset costs) are deemed reasonable for purposes of FAR part 31 with no further analysis necessary on the part of the contracting officer, provided that the U.S. defense contractor submits to the contracting officer a signed offset agreement or other documentation showing that the FMS customer has made the provision of an indirect offset of a certain dollar value a condition of the FMS acquisition. FMS customers are placed on notice through the LOA that indirect offset costs are deemed reasonable without any further analysis by the contracting officer.

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